No. 06-1217

IN THE

Supreme Court of the United States

IOWA NETWORK SERVICES, INC.,

Petitioner,

v.

QWEST CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit holding that, under the Telecommunications Act of 1996 and the Federal Communications Commission's interpretive and implementing decisions, exchange access charges, or access tariffs such as Iowa Network Services seeks to impose, do not apply to the transport and termination of local telecommunications traffic.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Qwest Corporation states that it is a wholly owned subsidiary of Qwest Communications International Inc., which has no parent company. Legg Mason Capital Management, Inc. (a/k/a Investment Adviser Subsidiaries of Legg Mason, Inc.), a wholly owned subsidiary of Legg Mason, Inc., a publicly traded company, owns more than 10% of the stock of Qwest Communications International Inc. No other publicly held company owns more than 10% of the stock of Qwest Communications International Inc.

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INTRODUCTION

Iowa Network Services ("INS") asks this Court to review the Eighth Circuit's unsurprising decision that once Congress and the Federal Communications Commission ("FCC") have prescribed the kind of charges that may be applied to regulated telecommunications services, and the procedure for establishing those charges, a carrier such as INS may not disregard that decision and unilaterally file a tariff imposing an entirely different kind of charge.

Congress gave the FCC jurisdiction to make rules implementing the Telecommunications Act of 1996's ("1996 Act") amendments to the Communications Act of 1934. The FCC used that authority to determine that wireless calls that originate and terminate in the same Major Trading Area ("MTA") are "local" calls under the 1996 Act. Therefore, the FCC determined that such calls are not subject to "access charges," which carriers charge for carrying another carrier's *long distance* calls. Instead, compensation for the transport and termination of local wireless calls is to be governed by "reciprocal compensation" arrangements between carriers.

The Eighth Circuit reviewed these rulings and reached the obvious conclusion:

> In this case, the calls originate and terminate within the same local MTA; therefore, they are considered to be "local" calls. According to the FCC's ruling, because these calls are "local," they are to be governed by reciprocal compensation arrangements. . . . Because the traffic in

> this case is "local," and therefore covered by 47 U.S.C. §§ 251, 252, INS's [access] tariff is not applicable.

Iowa Network Servs., Inc. v. Qwest Corp., 466 F.3d 1091, 1096-97 (8th Cir. 2006).

This decision does not conflict with the decision of any other circuit court or state court of last resort, and does not address any important questions of federal law in a way that conflicts with relevant decisions of this Court. The Eighth Circuit did not invalidate INS's tariffs or create an exception to the "filed tariff doctrine" as INS contends.

To the contrary, the court considered and rejected INS's filed tariff arguments as irrelevant for the mundane reason that under the 1996 Act and the FCC's interpretive and implementing determinations, INS's access tariff *did not apply* under the factual circumstances involved in this case. Indeed, the court noted that its determination that "the charges as set out in INS's tariffs do not apply to the [local] traffic at issue in this case . . . does not mean that the tariff does not apply to interstate or foreign traffic." 466 F.3d at 1097. There is nothing in the Eighth Circuit's decision that warrants review by this Court, and the Petition should be denied.

STATEMENT OF THE CASE

This case concerns the rights and obligations of telecommunications carriers acting as intermediaries that transport calls (generally called "traffic") placed by customers of third-party commercial mobile radio

service ("CMRS") providers. CMRS providers are also known as wireless carriers, and they provide mobile wireless services such as cellular telephone service.

INS seeks recovery of "access charges" from Qwest for the transport by INS of local telephone calls that are carried over the networks of at least four carriers. The calls are placed (*i.e.*, "originated") by customers of third-party wireless carriers. The calls are then delivered by the wireless carriers to Qwest and carried over its network to INS, which transports the calls to the local telephone company serving the called parties. The local telephone company then routes and delivers (*i.e.*, "terminates") the calls to the premises of the party being called. The traffic that was originated by customers of other carriers that passes through the networks of Qwest and INS en route to third-party terminating carriers is called "transit traffic."

Qwest and INS are involved in the transport of these calls because the originating wireless carriers and the terminating local exchange carriers elected to "interconnect" their networks indirectly via Qwest to permit their end user customers to call each other.[1] This provides for efficient interconnection, but places Qwest in the middle of a dispute between INS and

[1] The term "interconnection" refers to the physical linking of networks owned by different carriers for the mutual exchange of traffic. Interconnection can be direct or indirect. Interconnection is direct when a carrier's equipment is attached to another carrier's facilities. Interconnection is indirect when the attachment is through the facilities of an additional carrier. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 17806, 17845 n.198 (FCC 2000).

the originating wireless carriers over compensation to INS for the wireless carriers' use of INS's network to place calls to customers served by the terminating local telephone companies.

A. The Telecommunications Act of 1996

The 1996 Act imposed on telecommunications carriers a number of duties and prescribed a detailed process for the implementation of these duties. Section 251(a)(1) requires all carriers to "interconnect, directly or indirectly," with other carriers. 47 U.S.C. § 251(a)(1). Section 251(b)(5) imposes an additional duty on local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). A "reciprocal compensation arrangement" is one in which "each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e).

The 1996 Act establishes a system to facilitate the negotiation of agreements between carriers. "Indeed, the point of [47 U.S.C.] § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements."[2] If the parties fail to reach an agreement through negotiations, either party may petition the relevant state public utility commission

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[2] *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003).

to arbitrate and resolve any open issue. The final agreement must be approved by the state commission.[3]

The "comprehensive" process set out in Section 251 and 252, 47 U.S.C. §§ 251-52, is the exclusive means for establishing the arrangements contemplated by the Act's substantive provisions.[4] Neither carriers nor regulatory agencies may bypass the interconnection process Congress established in the 1996 Act through a unilateral tariff filing.[5]

B. The FCC's *Local Competition Order*

Six months after the 1996 Act was passed, the FCC issued a First Report and Order implementing the 1996 Act's local competition provisions, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (FCC 1996) ("*Local Competition Order*"). Among numerous other issues, the FCC specifically addressed the applicability of sections 251 and 252 to the regulation of "LEC-CMRS interconnection." *Local Competition Order*, 11 FCC Rcd at 16005-06, ¶¶1022-24.

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[3] *Id.* (citing 47 U.S.C. §§ 252(b), 252(e)(1)).

[4] *Verizon N., Inc. v. Strand*, 309 F.3d 935, 939, 941 (6th Cir. 2002); *Iowa Utils. Bd.*, 120 F.3d at 801 (noting the "Act's design to promote negotiated binding agreements").

[5] *Verizon N.*, 309 F.3d at 941; *see also TSR Wireless, LLC v. U S West Communs., Inc.*, 15 FCC Rcd 11166, 1183 ¶29 (2000) (1996 Act and FCC's implementing regulations apply "regardless [of any inconsistent] federal or state tariff").

To determine which calls are subject to reciprocal compensation for transport and termination under section 251(b)(5), the FCC distinguished between "local" calls and "long-distance" calls. *Id.* at 16012-13, ¶1033. Historically, a call has been treated as a local call if it originates and terminates in the same local calling area, and a call is long distance if it terminates in local calling area different than the one in which it originates. *See Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1072 n.3 (8th Cir. 1997). Long distance carriers use the local networks of local exchange carriers to originate and terminate long distance calls, and pay them "access" charges. *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 n.9 (8th Cir. 1998).

In paragraph 1034 of its *Local Competition Order*, the FCC concluded that "Section 251(b)(5) reciprocal compensation" applies "to traffic that originates and terminates within a local calling area." 11 FCC Rcd at 16013, ¶1034. In contrast, "[t]raffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges." *Id.* at 16013, ¶1035.

The FCC next "define[d] the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5)." *Id.* at 16014, ¶1036. Noting that "[d]ifferent types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the 'Major Trading Area' (MTA)," the FCC concluded that the MTA is "the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation. . . ." *Id.* "Accordingly, traffic to or from a CMRS network

that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges." *Id.*

C. The Decision of the Iowa Utilities Board

Virtually all of the issues raised by INS's Complaint were resolved against it in a lengthy administrative proceeding before the Iowa Utilities Board ("the Board"). In 1999, Qwest advised INS that as a transiting carrier it was not responsible for paying access charges or other compensation for the transport and termination of wireless traffic originated by third-party CMRS providers. INS disagreed, asserting that Qwest, although it was merely a transit carrier, was responsible for access charges under INS's state and federal access tariffs. On May 19, 2000, Qwest filed with the Board a petition for declaratory order regarding the exchange of local traffic between wireless and other local calling entities that transited Qwest's network.

At the end of the Board proceeding, which included evidentiary hearings, the Board held that INS is *not* entitled to tariffed long distance access charges for transporting local calls placed by customers of wireless carriers, but that INS may seek compensation from wireless carriers by way of interconnection agreements establishing reciprocal compensation arrangements for the exchange of local traffic. In particular, the Board held that:

> (1) Under the FCC's rules and orders, intra-MTA wireless-originated traffic is local and not subject to access charges.

In re Exchange of Transit Traffic, Docket No. SPU-00-7, 2002 Iowa PUC LEXIS 103, at *2, *4-8 (Iowa Utils. Bd. 2002).

(2) Under the 1996 Act and the FCC's implementing decisions, access charges and access tariffs do not apply to local traffic. *Id.* at *14.

(3) Accordingly, "Qwest . . . has no obligation to pay access or other terminating fees because this is local traffic." *Id.* at *2.

(4) INS is entitled to compensation under agreements negotiated (and arbitrated, if necessary) with the originating wireless carriers for the transiting function INS performs. *Id.* at *18.

Accordingly, the Board directed INS to negotiate interconnection agreements with the originating wireless carriers, with Board arbitration available to resolve disputes. *Id.* The Board also directed Qwest and INS, as transiting carriers, to participate in the negotiations, and observed that INS should seek compensation from either the originating wireless carriers or terminating local telephone companies through that process. *Id.*

D. INS's Federal "Collection" Action

INS refused to comply with the Board's directive to negotiate a compensation arrangement with the wireless carriers. Instead, it filed a Complaint in federal district court that purported to be a

"collection" action, and made no mention of the Board's proceeding that rejected the same claims. In the district court, INS asserted that Qwest's involvement as an intermediate carrier converted local calls into long distance calls subject to the access charges assessed on long distance carriers. Second, INS claimed that because Qwest was the carrier from which it received the calls, this compensation obligation should be placed on Qwest. Finally, INS claimed that, notwithstanding the FCC's and Board's pronouncements to the contrary, INS could make local calls subject to long distance access charges through a unilateral tariff filing.

Noting that INS had elected not to seek judicial review, but had instead purported to file an original collection action, the district court granted Qwest's motion to dismiss the Complaint under principles of claim preclusion. INS appealed to the Eighth Circuit, which reversed, holding that allowing claim preclusion would deprive INS of its right to federal judicial review of a state commission decision that "was indisputably interpreting federal law." *Iowa Network Servs., Inc. v. Qwest Corp.*, 363 F.3d 683, 693 (8th Cir. 2004) ("*INS v. Qwest I*"). The Eighth Circuit "express[ed] no opinion" on the merits of the Board's determinations, and remanded the case for the district court "to decide for itself whether the traffic at issue is subject to access charges pursuant to INS's tariffs." 363 F.3d at 694-95.

On remand, INS asserted that the plain language of its access tariffs covered the calls at issue, its tariffs were filed with regulatory agencies, and Qwest therefore had to pay INS access charges pursuant to the filed tariff doctrine. App. 36a-37a. However, INS

admitted below that "[t]he calls at issue in this case . . . begin and end within the Major Trading Area No. 32 Des Moines Quad Cities" and can therefore "be referred as intraMTA wireless-originated calls." Joint Appendix to the Eighth Circuit v.IV at 1652. In a detailed opinion, the district court concluded that INS's federal access tariff does not apply to the traffic at issue because it is classified as local traffic by the FCC, and that the Board acted in accordance with federal law in requiring INS to seek compensation for its services under negotiated agreements. *See* App. 146a.

INS appealed and the Eighth Circuit affirmed. *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091 (8th Cir. 2006) ("*INS v. Qwest II*"). First, the court reaffirmed its conclusion in *INS v. Qwest I* that the 1996 Act and the FCC "differentiate[ ] between transport and termination of local traffic and access for long-distance telecommunications." *INS v. Qwest II*, 466 F.3d at 1096. While access charges apply for long distance calls, reciprocal compensation rules govern compensation for local calls. *Id.* (citing *Local Competition Order*, 11 FCC Rcd. at 16016 ¶1041). The court then determined that "[i]n this case, the calls originate and terminate within the same local MTA; therefore, they are considered to be 'local' calls. According to the FCC's ruling, because these calls are 'local,' they are to be governed by reciprocal compensation arrangements." *INS v. Qwest II*, 466 F.3d at 1096-97. "Because the traffic in this case is 'local,' and therefore covered by 47 U.S.C. §§ 251, 252, INS's tariff is not applicable." *Id.* at 1097. "As a result, the district court did not err in granting Qwest's motion for summary judgment." *Id.*

REASONS FOR DENYING THE PETITION

INS seeks Supreme Court review of the Eighth Circuit's straightforward application of the FCC's determination that intra-MTA wireless calls are local in nature, and therefore not subject to the access charges INS has attempted to unilaterally impose. In the end, INS argues that it may override valid FCC and Board regulations and decisions by filing tariffs invoking the "deemed lawful" and "filed rate" and provisions of the Communications Act of 1934, 47 U.S.C. §§ 204(a)(3) and 203(c). *See* Petition for Writ of Certiorari ("Petition") at 8-9.

The FCC, the Board, the district court, and the Eighth Circuit have all rejected INS's position and reached the same conclusion – long distance access charges and therefore access tariffs do not apply to transit services provided for local wireless calls. Since INS's access tariffs do not apply to the local traffic at issue here, the filed tariff doctrine is simply irrelevant. There is no reason for further review by this Court.

A. Access Charges and Access Tariffs Do Not Apply to Local Transit Traffic

The FCC's *Local Competition Order* specifically addressed the applicability of sections 251 and 252 to LEC-CMRS interconnection, and distinguished "local" calls and "long-distance" calls. *Local Competition Order*, 11 FCC Rcd at 16013, ¶1033. In paragraph 1034 of the *Local Competition Order*, the FCC held that reciprocal compensation applies to traffic that originates and terminates within a local calling area, and interstate and intrastate access

charges apply to traffic "originating or terminating outside of the applicable local area." *Id.* at 16013, ¶1034.

The FCC then defined the local service area for wireless calls as the "Major Trading Area" or "MTA." *Id.* at 16014, ¶1036. "Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges." *Id.* There is no dispute that the calls at issue here originated and terminated within the same MTA.

The FCC made clear that this analysis extends to transiting carriers, such as Qwest in its role here, in its subsequent *Texcom* decisions. At issue in *Texcom* were intra-MTA (and therefore local) calls that originated on the networks of third-party carriers, transited the network of GTE North ("GTE"), then terminated on the network of complainant Answer Indiana, a wireless carrier. *Texcom, Inc., v. Bell Atl. Corp.*, 16 FCC Rcd 21493, ¶1 (FCC 2001). Answer Indiana's complaint alleged that GTE's attempt to recover from it the costs GTE incurred to terminate the calls were unlawful. *Id.* at 21494, ¶3. In denying Answer Indiana's complaint, the FCC discussed the application of its transport and termination rules to the transiting context:

> Currently, our rules in this area follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic, and ultimately their customers. Thus, through reciprocal compensation payments, the cost of

> delivering LEC-originated traffic is borne by the persons responsible for those calls, the LEC's customers. . . . In the case of third-party originated traffic, however, the only relationship between the [transiting carrier's] customers and the call is the fact that the call traverses the [transiting carrier's] network on its way to the terminating carrier. Where the LEC's customers do not generate the traffic at issue, those customers should not bear the cost of delivering that traffic from a CLEC's network to that of a CMRS carrier like Answer Indiana. Thus, the originating third party carrier's customers pay for the cost of delivering their calls to the LEC, while the terminating CMRS carrier's customers pay for the cost of transporting that traffic from the LEC's network to their network.

Id. at 21495, ¶6 (footnotes omitted). On reconsideration, the FCC also noted that "the cost of using the facilities at issue [*i.e.*, the transiting facilities] typically is recovered through reciprocal compensation charges to originating carriers," although "carriers are free to negotiate different arrangements for the costs associated with indirect interconnection." *Texcom, Inc. v. Bell Atl. Corp.*, 17 FCC Rcd 6275, 6277 ¶4 n.12 (FCC 2002) (citing 47 U.S.C. § 252(a)(1)).

The FCC's Common Carrier Bureau ("CCB") also considered transit traffic during its arbitration of two interconnection agreements for the state of Virginia. There, WorldCom requested that Verizon be required

to act as a billing intermediary for transit traffic WorldCom exchanged with third-party carriers. *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27099-100, ¶114 (FCC 2002). Verizon objected to this request, arguing that it would contravene WorldCom's own duties to establish reciprocal compensation arrangements with other carriers. *Id.* The CCB rejected WorldCom's request, "agree[ing] with Verizon that interconnection and reciprocal compensation are the duties of all local exchange carriers." *Id.* at 27102, ¶119.

The CCB also rejected a request by AT&T that Verizon compensate AT&T for calls that originated on the network of a third-party carrier and were terminated to AT&T customers. Specifically, AT&T "propose[d] that Verizon treat all such calls as Verizon's own traffic." *Id.* at 27303, ¶541. The CCB rejected this proposal, agreeing with Verizon that "when a third-party LEC places a call that terminates to [an AT&T customer], AT&T must bill the third-party LEC directly." *Id.* at 27305, ¶544.

Therefore, it is clear that under the FCC's existing precedents, wireless calls that originate and terminate within the same MTA are not subject to access charges. As a result, they are not subject to access tariffs, regardless of the language carriers such as INS insert in their tariffs in an attempt to override the FCC's implementation of Congressional mandates. INS has no power to unilaterally reclassify local traffic and impose access charges.

B. INS's Tariff Is Not a "Reciprocal Compensation Arrangement" as Defined by the 1996 Act

INS's assertion that its access tariff qualifies as a "reciprocal compensation arrangement" under Section 251(b) of the 1996 Act, 47 U.S.C. § 251(b), is also incorrect. *See* Petition at 10. "[A] reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e).

The traffic at issue here originates on the networks of third-party wireless carriers, and terminates on the networks of third-party local exchange carriers. *See* Petition at 10. None of it is originated or terminated by Qwest or INS. *Id.*; *see* App. 53a-62a – *Iowa Network Servs., Inc. v. Qwest Corp.*, (S.D. Iowa 2005). Therefore, INS's tariff cannot be a "reciprocal compensation arrangement" as defined by the FCC's regulations.

C. No Statute or FCC Regulation Authorized the Filing of Federal Tariffs for the Traffic at Issue Here

The "deemed lawful" and "filed tariff" provisions of the 1934 Act cannot apply here as INS contends because there is no statutory or regulatory authorization for INS to file federal access tariffs covering local transit traffic originating from wireless carriers.

In *Global NAPs, Inc. v. FCC*, 247 F.3d 252 (D.C. Cir. 2001), a local exchange carrier ("GNAPs") filed a tariff with the FCC seeking to impose an $ 0.008 per minute charge on all Internet-bound calls received from other carriers, and providing that a carrier's failure to compensate GNAPs for Internet-bound traffic as "'local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate [GNAPs] under the terms of this Tariff.'" *Id.* at 255 (brackets in original). On appeal of an FCC ruling that the tariff was void, the District of Columbia Circuit noted that "[m]erely because a tariff is presumed lawful upon filing does not mean that it is lawful. Such tariffs still must comply with the applicable statutory and regulatory requirements." *Id.* at 260.

Here, as in *Global NAPs*, "[t]he FCC has not authorized, let alone required, carriers to file tariffs" for the traffic at issue. *Id.* at 259-60. To the contrary, the FCC made clear in its *Local Competition Order* that it "expected carriers to enter into interconnection agreements that would set compensation subject to state commission approval." *Global NAPs*, 247 F.3d at 260.

D. The "Filed Rate" and "Deemed Lawful" Provisions of Sections 203(c) and 204(a)(3) do not Apply to the "Local" Traffic at Issue Here

The Eighth Circuit's determination that the "filed rate" provision of 203(c) does not apply under the specific circumstances of this case is not "contrary to a century of uniform decisions of this Court" as INS contends. *See* Petition at 5. By its terms, Section 203

does not apply to the transport and termination of the local traffic at issue here.

Section 203(a) requires carriers to file with the FCC "schedules [*i.e.*, tariffs] showing all charges . . . *for interstate and foreign* wire or radio communication . . . and showing the classifications, practices and regulations affecting such charges." 47 U.S.C. § 203(a) (emphasis added). Section 203(c) prohibits a carrier from enforcing "charges" or "classifications, regulations or practices" affecting charges "for *such* communication" other than those specified in the tariffs. 47 U.S.C. § 203(c) (emphasis added).

The "communications" that are the subject of the Board's decisions and the complaint below are local, not "foreign or interstate." Therefore, Section 203 of the 1934 Act simply does not apply and the filed tariff doctrine is not implicated here. As the Eighth Circuit noted, its determination that "the charges as set out in INS's tariffs do not apply to the [local] traffic at issue in this case . . . does not mean that the tariff does not apply to interstate or foreign traffic." *INS v. Qwest II*, 466 F.3d at 1097.

E. To the Extent that INS Claims It Is Not a Local Exchange Carrier, the "Deemed Lawful" Provision of Section 204(a)(3) Could Not Apply Here

If in reply INS asserts that it is not acting as a "local exchange carrier" subject to the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. § 251(b)(5), then Section 204(a)(3)'s "deemed lawful"

provision could not apply to INS's tariff for an additional reason. By its terms, section 204(a)(3) applies only to filings by "local exchange carriers." 47 U.S.C. § 204(a)(3).

F. INS's Amended Federal Tariff Fails to Comply with Regulations Governing the Form and Content of Tariffs

FCC regulations prohibit tariffs from referencing "any other document or instrument." *See* 47 C.F.R. § 61.74(a). The FCC also requires tariffs to be "clear and explicit." *See* 47 C.F.R. § 61.2(a). The relevant provisions of INS's federal access tariff violate both regulations.

The FCC has explained that under section 61.2(a), "a tariff must be clear and explicit on its face as to when it applies, in order to give fair notice to carriers or other customers about the terms under which they might be taking service and incurring charges." *Bell Atl. v. Global NAPs*, 15 FCC Rcd 20665, 20674, ¶23 (FCC 2000). Stated another way, one must be able to "discern from the face of the tariff whether it has incurred any charges thereunder." *Id.*

In a decision affirmed by the D.C. Circuit, the FCC held unlawful and unenforceable under section 61.2(a) a tariff provision that required payment pursuant to its terms unless the carrier had already made "Alternative Payments." *Id.* at 20674-75, ¶23. The FCC reasoned that "the contingent and unclear application of the tariff" made it impossible "to determine from the face" of the tariff whether the tariff applies. *Id.*

INS's tariff is even more deficient in this respect, since the liability of intermediate carriers such as Qwest is based on INS's evaluation of the sufficiency of the billing information provided by such carriers. *See* Petition at 3. It thus cannot be determined from "the face of the tariff" whether the tariff imposes liability on the intermediate carrier. As a result, the INS tariff is inapplicable for the additional independent reason that it fails to comply with FCC rules.

CONCLUSION

As this Court has previously held, Congress gave the FCC jurisdiction to interpret and implement the 1996 Act. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999). The FCC definitively ruled in 1996 that the calls at issue here are "local" calls. Therefore, the FCC concluded that "reciprocal compensation," and not "access charges," would apply. The Eighth Circuit simply reviewed the relevant statutes and regulations and reached the same conclusion – the calls at issue here are local calls and INS's access tariff is not applicable.

The Eighth Circuit therefore correctly stated the applicable rules, and then correctly applied them. There is no compelling reason for this Court to grant INS's Petition for Writ of Certiorari. The Petition should therefore be denied.

Respectfully submitted,

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